The Sixth Circuit's rationale for striking down Ohio's ITC is irreconcilable with these decisions. *Compare Cuno*, 386 F.3d at 745-46 (rejecting distinction between laws that benefit in-state interests by burdening out-of-state interests and laws that benefit in-state interests without imposing a corresponding burden); *with Caterpillar*, 488 N.W.2d at 192 (holding that a statute designed to promote in-state investment does not for that reason violate the Commerce Clause).[2] The Sixth Circuit held that, even though Ohio's ITC was available to any corporation, domestic or foreign, that satisfied the statutory requirements, the credit was nonetheless discriminatory solely because it encouraged "businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state." *Cuno*, 386 F.3d at 743.

The ITC at issue in this case is typical of the location-based incentives used regularly by the majority of States to encourage in-state economic activity. *See* Edward A. Zelinsky, *Cuno v. DaimlerChrysler: A Critique*, 34 St. Tax Notes 37, 37 (2004). Accordingly, the Sixth Circuit's holding casts a broad shadow of uncertainty over all State efforts to encourage in-state economic development through location-based tax incentives.

The court's sweeping conclusion that state action violates the Commerce Clause solely because it encourages businesses to expand locally rather than out-of-state implicates nearly every taxing decision that State revenue departments routinely make. *See Economic Development and the Dormant Commerce Clause: the Lessons of Cuno v. Daimler Chrysler and Its Effect on State Taxation Affecting Interstate Commerce: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. (May 24, 2005) (hereinafter *Hearings*) (testimony of Prof. Edward A. Zelinsky) ("[T]here is no

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[2]The conflict of authority created by the Sixth Circuit's decision results in the anomalous situation where state and federal courts within the same state must apply conflicting rules of decision.

principled basis for distinguishing the investment tax credit struck by the Sixth Circuit from other, routine tax and spending programs of state governments including the property tax relief which the appeals courts sustained."). "If *Cuno* is correct, virtually no state tax policy (including a general reduction of corporate income tax rates) is immune from a Commerce Clause challenge." Zelinsky, *supra*, at 37.

II. The Sixth Circuit's opinion will substantially impair the ability of every State to attract economic investment through tax incentives.

Because the Sixth Circuit's opinion presents no logical means of distinguishing permissible from discriminatory investment tax incentives,[3] it will have an immediate, nationwide impact by eviscerating the efficacy of State tax incentives. Opponents of State tax incentives "will now be emboldened to emulate the *Cuno* strategy of challenging such preferences under the Commerce Clause nondiscrimination test codified in *Complete Auto*." *Id.* at 39; Jennifer Carr & Cara Griffith, *Litigation and Tax Incentives After the Downfall of Ohio's ITC*, 36 St. Tax Notes 367, 368-69 (2005) ("If the Supreme Court denies certiorari [in *Cuno*], . . . there would likely be dozens of suits filed . . . challenging the validity of tax incentives across the nation."). Due to the threat of litigation exposure, corporations considering capital expansion will be disinclined to rely on the incentives currently offered by the States. *See* 151 Cong. Rec.

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[3] The Sixth Circuit's rationale for invalidating the ITC while upholding Ohio's property tax exemption only adds to the confusing nature of the opinion. The court distinguished the property tax exemption from the ITC on the ground that the ITC discriminated "based on an independent form of commerce" while the property exemption "raise[d] no constitutional issues [because] the conditions for obtaining the favorable tax treatment [we]re related to the use or location of the property itself." *Cuno*, 386 F.3d at 746. As both Petitioners and Respondents recognize, there is no basis for this distinction in this Court's jurisprudence. Petition for Certiorari, at 3, n.1; *Cuno v. DaimerChrysler, Inc.*, No. 04-1407, Petition for Certiorari, at 7, 8, 11-12.

S5437, 5444 (daily ed. May 18, 2005) (statement of Sen. Voinovich) ("States and businesses have been reluctant to go forward with new projects that depend on the availability of tax incentives out of concern that the *Cuno* decision may be used to invalidate those incentives."); Jay C. Biggins, *Addressing Incentive Uncertainties: How companies can cope while the Cuno case is being resolved*, Site Selection 232 (May 2005), *available at http://www.siteselection.com/issues/2005/may/p232* ("Some of our clients already have decided to eliminate jurisdictions from the 'short list' because their incentives programs could be at risk under *Cuno*, . . . ").[4]

Due to the broad and confusing nature of the Sixth Circuit's opinion, the States will be unable to respond effectively to these concerns. States seeking to attract economic investment are faced with limited budgets and finite time constraints. Accordingly, the absence of a uniform, articulable rule for differentiating what is permissible from what is discriminatory will almost inevitably result in a significant number of lost opportunities for economic development, and an inefficient use of the States' very limited resources.[5]

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[4] *Olson v. Minnesota*, No. 62-C8-05-2727, filed in county district court for Ramsey County, Minnesota, and *Blinson v. North Carolina*, No. 05-CVS-8378, filed in county superior court for Wake County, North Carolina, present examples of the litigation risk States now face as a result of the Sixth Circuit's decision. The plaintiffs in *Olson* alleged that Minnesota's "Job Opportunity Building Zones ("JOBZ") Program violates the dormant Commerce Clause because it grants income tax exemptions designed to encourage businesses to expand into economically distressed areas designated by the State. The plaintiffs in *Blinson* allege that N.C. Gen. Stat. §§ 105-129.60-66 violates the dormant Commerce Clause because it authorizes tax incentives that are designed to induce computer manufacturing and distribution taxpayers to locate or expand facilities, and create jobs, in North Carolina.

[5] As both Petitioners and Respondents recognize, the absence of a uniform national rule following the Sixth Circuit's decision injures the States within the Sixth Circuit even more acutely. *Cuno v. DaimlerChrysler, Inc.*, No. 04-1407, Petition for Certiorari, at 19-20 ("[I]f different states, governed by the

Moreover, the States' inability to utilize investment tax incentives will substantially impair their ability to effectively compete with foreign nations for capital economic investment. *See, e.g.*, Robert J. Rolfe & Richard A. White, *Investors' Assessment of the Importance of Tax Incentives in Locating Foreign Export-Oriented Investment: An Exploratory Study*, 14 J. Am. Tax'n Ass'n, 39, 40 (1992) (noting that tax incentives are used by more than 70 developing countries); 151 Cong. Rec. S5437, 5444 (daily ed. May 18, 2005) (statement of Sen. Voinovich) ("As a former Governor who had to compete against Japan, Canada, China and Europe for new business projects, I know just how important a role tax incentives can play in attracting new businesses."); *Hearings* (testimony of Bruce Johnson) (testifying that Ohio competes with Canada, Mexico, and nations in Asia); *id.* (testimony of Michele R. Kuhrt) (testifying that her Ohio-based manufacturing corporation is evaluating locations in Ohio, Mexico, and Canada for a proposed expansion); *see also* Louise E. Single, *Tax Holidays and Firms' Subsidiary Location Decisions*, 21 J. Am. Tax'n Ass'n 17, 17-18 (1999) (identifying 19 nations that offer tax holiday incentives, and finding that the incentives can influence location decisions between nations that offer similar non-tax factors); Deen Kemsley, *The Effect of Taxes on Production Location*, 36 J. Acct. Res. 321 (1998) (finding that tax incentives encourage U.S. multinational corporations to use exports rather than foreign production to serve foreign markets). Because foreign nations are not constrained by the dormant Commerce Clause, the Sixth Circuit's decision has conferred a significant competitive

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different approaches of the circuit courts, have varying authorities to enact tax exemption programs . . . , it is almost inevitable that those states with the greater freedom to establish and enforce such programs will aggressively pursue their competitive advantage and establish the very 'preferential trade areas' the Commerce Clause seeks to avoid."). It is imperative that the Court swiftly establish uniform principles governing the validity of tax incentives under the Commerce Clause before irreparable harm is done to the economies of the Sixth Circuit States.

advantage on the States' foreign competitors. *Cf.* 151 Cong. Rec. S5437, 5444 (daily ed. May 18, 2005) (statement of Sen. Voinovich) ("I can assure you that our competitors [in the international community] are certainly not going to stop using tax incentives."). It is almost inevitable that competitors abroad will pursue this advantage against the United States.

III. Tax incentives benefiting in-state interests do not *per se* burden out-of-state interests.

The Sixth Circuit's holding in this case resulted from its over-reading of broad pronouncements this Court has made in deciding prior dormant Commerce Clause cases. This Court has cautioned that the courts "must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the constitution but merely represented judicial generalizations exceeding the concrete circumstances which they profess to summarize." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 445 (1940). In *Caterpillar*, the Michigan Supreme Court relied on this pronouncement in rejecting the substantively identical Commerce Clause challenge presented in that case. *Caterpillar*, 488 N.W.2d at 188, n.25. By contrast, the Sixth Circuit in this case clearly relied on "judicial generalizations" that are "not compelled by the constitution."

Although this Court has held that tax breaks that benefit in-state activity can violate the dormant Commerce Clause, *see Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977), it is far from intuitive that location-based tax incentives, that are not designed to discourage out-of-state economic activity, adversely impact Congress's authority "[t]o regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3; *see, e.g.*, Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 St. Tax Notes 189, 196 (2005) ("The Court has nowhere said that a state cannot structure its taxes to reduce the

cost of doing business locally or to give a boost to the local economy. . . . As long as a state tax provision does not discriminate, the dormant Commerce Clause does not go so far as to require a state legislature to subsidize the economic development of another state in activities in which it has no sovereign interest.") (footnote omitted); *but see Cuno v. DaimerChrysler, Inc.*, No. 04-1407, Petition for Certiorari, at 15 (challenging the constitutionality of Ohio's property tax exemption on the basis that the "practical effect" of the exemption "is to provide a powerful financial incentive for DaimlerChrysler to retain [4,200] jobs in Ohio, rather than relocate them to an alternative, out-of-state facility").

The Sixth Circuit's conclusion that a tax incentive cannot encourage in-state activity without discouraging out-of state activity renders it virtually impossible for States to "structure their tax systems to encourage the growth and development of intrastate commerce and industry." *Trinova*, 498 U.S. at 385-86 (internal quotation omitted). It simply does not follow that a tax incentive that benefits in-state economic interests necessarily burdens out-of-state economic interests in a way that violates the dormant Commerce Clause. *See West Lynn Creamery*, 512 U.S. at 199 (holding that State may not "benefit in-state economic interests *by burdening out-of-state competitors*.") (emphasis added); *see also, e.g., Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 404-05 (1984) (New York "Domestic International Sales Corporation" taxing scheme effectively taxed income attributable to New York export shipments at 30% of the rate charged to income attributable to export shipments from other States); *Boston Stock Exch.*, 429 U.S. at 319 (New York transfer tax statute taxed transactions involving out-of-state sales more heavily than most transactions involving in-state sales). Rather, a location-based tax incentive is akin to "[a] pure subsidy funded out of general revenue" which "merely assists local business"

and thus "ordinarily imposes no burden on interstate commerce."[6] *See West Lynn Creamery*, 512 U.S. at 199.

The primary focus of this Court's dormant Commerce Clause jurisprudence has been to remediate protectionist regulatory measures that are "designed to benefit in-state economic interests *by burdening out-of-state competitors*." *Id.* (emphasis added); *see also, e.g.*, *Granholm v. Heald*, 125 S. Ct. 1885, 1896 (2005) ("Allowing States to discriminate against out-of-state wine 'invites a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'") (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)); Firestone, *supra*, at 197 (arguing that this Court should reverse *Cuno* and hold that a state tax violates the dormant Commerce Clause "only when it has the effect of a tariff"). Limited in this manner, the dormant Commerce Clause is a logical corollary to the "very purpose of the Commerce Clause [which] was to create an area of free trade among the several States." *Boston Stock Exch.*, 429 U.S. at 328 (quoting *McLeod v. J.E. Dilworth Co.*,

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[6]The Sixth Circuit concluded that there was a bright-line distinction between subsidies and tax credits, for purposes of Commerce Clause analysis, that "results from the fact that the tax credit involves state regulation of interstate commerce through its power to tax." *Cuno*, 386 F.3d at 746. This conclusion elevates form over substance and ignores this Court's instruction that subsidies are generally constitutional because they "merely assist[] local business." *West Lynn Creamery*, 512 U.S. at 199; *see also, e.g.*, Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 Harv. L. Rev. 379 (1998) (arguing for the abandonment of the formalistic, bright-line distinction between "tax benefits" and "direct expenditures" and concluding that there is "no acceptable alternative to comparing particular tax and spending programs case-by-case with appropriate concern for particular constitutional provisions"); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 868-870 (1996) (defending distinction drawn between tax breaks and subsidies, notwithstanding their "often indistinguishable" economic consequences, on the ground that "the law is rife with rules centered on considerations of form"). Tax incentives designed to "merely assist local business" without penalizing out-of-state interests are no more or less discriminatory than analogous subsidies.

322 U.S. 327, 330 (1944)); *see also American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 282 (1987) ("The precise issue is . . . do the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce *in a way that contradicts the central purpose of the Commerce Clause?*") (emphasis added). Surely, the "free trade" purpose of the Commerce Clause was not so broad as to preclude States from competing with each other and with foreign nations for capital investment when doing so has no effect on the free flow of commerce across State and national borders.

In any event, this Court's dormant Commerce Clause jurisprudence is indeterminate and susceptible to multiple reasonable (albeit contradictory) constructions.[7] *See Hearings* (testimony of Prof. Walter Hellerstein) ("[W]e would be the first to recognize – and, in fact, explicitly did recognize – that much of the Court's dormant Commerce Clause doctrine is difficult to discern and that ours was not the only reading that could be given to the Court's precedents."). In the wake of the lower court's decision, clarification of that precedent has become imperative for the States that routinely rely upon investment tax incentives to create jobs and encourage development in areas that are economically depressed.

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[7] This Court has candidly referred to this body of law as a "quagmire" which "has left 'much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.'" *Boston Stock Exch.*, 429 U.S. at 329 (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959)). Indeed, "the one point on which virtually all observers of the Court's negative Commerce Clause doctrine would agree is that the law in this area is indeterminate." *Hearings* (testimony of Prof. Walter Hellerstein).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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No. 04-1704 & No. 04-1724

In the Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

WILLIAM W. WILKINS, ET AL.,

Petitioners,

v.

CHARLOTTE CUNO, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Brief Of *Amici Curiae* Louisville Area Chamber of Commerce, Inc., Greater Cincinnati Chamber of Commerce, Nashville Area Chamber of Commerce, Commerce Lexington, Inc., Scott County United, Inc., Northern Kentucky Chamber of Commerce & Tri-County Economic Development Corp., Knoxville Area Chamber Partnership, Chattanooga Area Chamber of Commerce, Memphis Regional Chamber of Commerce, Johnson City/ Jonesborough/Washington County Chamber Of Commerce & Economic Development Board, & Kingsport Area Chamber of Commerce In Support Of Ohio Petitioners' and DaimlerChrysler Corp.'s Petitions For Writ Of *Certiorari*

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INTEREST OF *AMICI CURIAE* IN THIS CASE[1]

Identification of the *Amici Curiae*

Louisville Area Chamber of Commerce, Inc. (d/b/a Greater Louisville Inc.), Greater Cincinnati Chamber of Commerce (d/b/a Cincinnati USA Regional Chamber), Nashville Area Chamber of Commerce, Commerce Lexington, Inc., Scott County United, Inc., Northern Kentucky Chamber of Commerce and Tri-County Economic Development Corporation, Knoxville Area Chamber Partnership, Chattanooga Area Chamber of Commerce, Memphis Regional Chamber of Commerce, Johnson

[1] Pursuant to Supreme Court Rule 37.6, the *Amici Curiae* Urban Chambers state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than the *Amici Curiae*, their members, and their counsel, make a monetary contribution to the preparation or submission of this brief. Counsel of record for all Petitioners and Respondents have consented to the filing of this brief.

City/Jonesborough/Washington County Chamber of Commerce and Economic Development Board, and Kingsport Area Chamber of Commerce (collectively, the "Urban Chambers") represent thousands of businesses in their metropolitan areas. The Urban Chambers and their members are engaged in business in Ohio, Kentucky, and Tennessee, and thus have a particular interest in the ultimate resolution of the constitutionality of Ohio's investment tax credit. Ohio's investment tax credit in no way violates the Commerce Clause, and, accordingly, the Sixth Circuit's decision should be reversed.

Greater Louisville Inc. is the metro chamber of commerce and economic development agency representing approximately 2,400 businesses and organizations in the Louisville, Kentucky – southern Indiana metropolitan area.

Cincinnati USA Regional Chamber is the nation's fifth largest chamber, representing the interests of more than 6,000 member businesses with approximately 380,000 employees in 15 counties in southwestern Ohio, northern Kentucky, and southeastern Indiana.

The Nashville Area Chamber of Commerce represents approximately 3,300 member businesses and 249,000 employees in a 10-county region in middle Tennessee.

Commerce Lexington, Inc. promotes economic development, job creation, and overall growth in Lexington, Kentucky and its neighboring communities. It includes over 1,800 member companies and over 3,700 business professionals.

Scott County United Inc. has 527 active members in Georgetown, Kentucky and surrounding areas, promoting and coordinating local economic development.

The Northern Kentucky Chamber of Commerce seeks to expand and develop business for a steadily rising tri-state region with a workforce of over 1 million in northern Kentucky and Cincinnati. It represents 1,900 business members consisting of regional, national, and international companies. Tri-County Economic Development Corporation is the primary economic development marketing agency and the primary entity for the retention and expansion of existing industries in Boone, Kenton, and Campbell Counties in northern Kentucky.

The Knoxville Area Chamber Partnership is a private, nonprofit, membership-driven organization focusing on economic development. Comprised of more than 1,700 member businesses, its primary focus is to drive regional economic prosperity. As the leading economic development agency for both the City of Knoxville and Knox County, Tennessee, the chamber focuses on generating business opportunities and creating an environment for networking and sustained prosperity.

The Chattanooga Area Chamber of Commerce brings Chattanooga, Tennessee-area businesses together in support of economic growth and initiatives that support the community. The Chattanooga Area Chamber of Commerce has more than 1,700 members, ranging from single employee operations to companies with more than 2,000 employees. It provides a range of services that support the expansion of existing industry, entrepreneurial activity, and business recruitment.

The Memphis Regional Chamber of Commerce is the leading economic development organization for the three-state, eight-county Memphis metropolitan area. The nearly 2,400 companies that comprise its membership range from large international companies having over 30,000 local employees to one-person businesses.

The Johnson City/Jonesborough/Washington County Chamber of Commerce and Economic Development Board provide services to the business community in the State of Tennessee's fourth largest metropolitan area. With nearly 900 members, its purpose is to promote economic and community development. The Board serves as an industrial/business recruiter, with a principal mission of promoting economic development.

The Kingsport Area Chamber of Commerce is a private, non-profit business organization comprised of nearly 1,000 business members in northeast Tennessee. Its goal is to utilize its resources to focus efforts on enhancing a strong and viable business environment for the Kingsport, Tennessee area.

The *Amici Curiae*'s Interest

If the lower court's ruling is permitted to stand, Ohio, Kentucky, Tennessee, Michigan, and these *Amici* could be outsiders deprived of the chance to compete freely in economic development activities with the other 46 States, as well as internationally.

The Urban Chambers are on the front lines of economic development activities for a global economy that starts, lives, and dies on the local level. Accordingly, the Urban Chambers have a keen interest in the outcome of this case because they are constantly involved in economic development, job creation, and brownfield revitalization in their respective states, regions, and metropolitan areas. They can explain the profound adverse effects on local communities that the Sixth Circuit's incorrect interpretation of the Commerce Clause will have, absent a grant of *certiorari* and reversal.

The Sixth Circuit's opinion undermines the Urban Chambers' ability to engage in the economic competition that is the underlying goal of the Commerce Clause. *See Bacchus Imps. v. Dias*, 468 U.S. 263, 272 (1984) ("[C]ompetition among the States for a share of interstate commerce is a central element of our free-trade policy."). Until this Sixth Circuit opinion, all states were "free to 'structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Caterpillar, Inc. v. Dept. of Treasury*, 440 Mich. 400, 424, 488 N.W.2d 182, 192 (1992) (quoting *Boston Stock Exch. v. Tax Comm'n*, 429 U.S. 318, 336-37 (1977)). Even the Respondents agree that it is "vital for this Court to step in to resolve the conflict among the circuits, so that businesses will be able to make well-informed decisions about where to locate new facilities, and so that state and local governments will be able to design and offer incentive packages that comport with constitutional requirements." *See* Cuno, *et al.*'s Petition for Writ of Certiorari, Case No. 04-1407, at 19.

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals overturned Ohio's statutory investment tax credit program, which was designed to encourage all manufacturers, both in and outside of Ohio, to make capital and other job creating investments in Ohio. In exchange for any manufacturer making a qualifying investment in Ohio, the program provided a credit against the manufacturer's Ohio franchise tax liability, which otherwise would necessarily increase due to the new capital investment. The program applies equally to all manufacturers regardless of their state of incorporation, principal place of business, or location of other facilities or operations. Moreover, the investment tax credit program placed no burden upon manufacturers that chose to invest their resources in other locations outside of Ohio. Nevertheless, the Sixth Circuit accepted the plaintiffs-

respondents' admittedly novel theory to find this tax program in violation of the Commerce Clause.

SUMMARY OF ARGUMENT

This case presents a significant issue for cities, businesses, and workers nationwide, because the Sixth Circuit's ruling creates a conflict between that court, the Michigan Supreme Court, and this Court's precedent. That conflict strikes at the heart of States' abilities to employ common tax incentive programs as means of encouraging economic development and job creation. As it stands now, the Sixth Circuit's ruling creates, rather than remedies, an undue burden on interstate commerce.

First, states are constitutionally permitted to enact laws that have the "effect of encouraging domestic industry." *Bacchus*, 468 U.S. at 271-72. Certainly, "a discriminatory effect does not result from fair encouragement of in-state business...." *Caterpillar*, 488 N.W. 2d at 193 (citing *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984); *Boston Stock Exchange*, 429 U.S. at 336-37). As supported by a wide range of data regarding new investments and thousands of newly created jobs, the Ohio investment tax credit has neither an impermissible purpose nor an impermissible effect.

Second, the Sixth Circuit's decision is a departure from prior Supreme Court jurisprudence interpreting the dormant Commerce Clause. *See Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 385-86 (1991); *Bacchus*, 468 U.S. at 272; *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 407 n. 12 (1984). This Court has consistently ruled that States may structure their tax codes and provide economic development incentives as mechanisms for competition amongst themselves. The Sixth Circuit's ruling abandoned that precedent, and wholly failed to identify any grounds for

the adoption of plaintiffs-respondents' novel application of the Commerce Clause. In addition, the Sixth Circuit's ruling creates a direct conflict with the Michigan Supreme Court's decision in *Caterpillar*. In *Caterpillar*, the Michigan Supreme Court addressed a similar dormant Commerce Clause attack on a state investment tax credit, and found that tax credit to comply with this Court's rulings and guidance. Therefore, inconsistent rulings place States within the Sixth Circuit on an uncertain foundation and at a disadvantage relative to the remaining 46 States that remain free to employ such long-accepted economic development tools.

Third, this Court has previously stated that a state tax program must have internal consistency, *i.e.*, it "must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *American Trucking Ass'n, Inc. v. Scheiner*, 482 U.S. 266, 284 (1987) (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)). In the context of this case, virtually every State employs tax incentives for promoting economic development. Regardless of arguments as to the efficacy of those incentive programs, there is absolutely no evidence that they are interfering with free trade. Ironically, interference with free trade will arise only if the Sixth Circuit's opinion stands, thereby prohibiting Ohio, and possibly Kentucky, Tennessee, and Michigan, from utilizing the competitive tools that remaining States have used for decades and continue to use.

ARGUMENT

Review of this matter is essential. That review could easily (1) enforce the notions of federalism recognized by this Court that permit States to encourage domestic commerce; (2) resolve conflicting rulings that now exist within the Sixth Circuit; and (3) prevent the Sixth Circuit's ruling from significantly interfering with interstate commerce and free trade.